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Supreme Court of the United States

OCTOBER TERM, 1979
No. 79-617

MURIEL S. SMITH,

Appellant,

vs.

ROSE PENTA, Judge of Board of Elections, District One, Borough of Highlands; ALYNN TRACY HECK, Superintendent of Elections; County of Monmouth, State of New Jersey; ANN FLYNN, Monmouth County Board of Elections; STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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MOTION TO DISMISS

Pursuant to *Rule* 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of appellees, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

QUESTIONS PRESENTED

1. Does an individual, previously affiliated with a particular political party, have a constitutionally protected right to vote in another party's primary election without complying with the requirement of *N.J.S.A.* 19:23-45 that a new party affiliation must be declared at least 50 days prior to a primary election?

2. Does the exemption of newly registered and independent voters in *N.J.S.A.* 19:23-45 from the declaration of party affiliation imposed on previously affiliated voters constitute a legitimate and reasonable legislative classification?

COUNTER-STATEMENT OF THE CASE

On June 7, 1977 a primary election was held in New Jersey (A2).[1] On that day Ms. Smith, a registered Republican who resided in the Borough of Highlands in Monmouth County, New Jersey, attempted to register as a Democrat so as to be able to vote in the Democratic primary (A2). Plaintiff admits that she had not attempted to change her affiliation from the Republican party to the Democratic party prior to the primary election day on June 7, 1977 (A28).

Ms. Smith's attempt to vote in the Democratic primary was denied on the basis that she had not filed a declaration of intent to vote in another party's primary at least 50 days prior to the primary date (A28), as required by *N.J.S.A.* 19:23-45 (set forth in Appellant's Jurisdictional Statement at 2-4). On that same day, June 7, 1977, she sought judicial relief in the form of a Verified Complaint and Order to Show Cause filed in the Superior Court of New Jersey, Law Division (A27 to A33). The Order to Show Cause was denied and the complaint dismissed, and that same day the Appellate Division of the Superior Court affirmed this ruling (A33 to A38). The Supreme Court of New Jersey granted a petition for certification, 76 N.J. 235 (1978), and affirmed the ruling below. The majority decision of the Supreme Court of New Jersey found that several decisions of this Court "make it abundantly clear that the New Jersey statute under attack suffers from no federal constitutional infirmity" (A8). Indeed, the two dissenting Justices also found that "this system [of declaring party affiliation] is apparently permissible under the federal constitution" and based their dissent on an allegedly "greater protection" afforded by the New Jersey State Constitution (A18).

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1. This notation refers to the appellant's appendix filed with her jurisdictional statement.

ARGUMENT

The appellant has not presented a substantial constitutional issue entitling her to appeal, because the decisions of this court firmly establish that the requirements of *N.J.S.A.* 19:23-45 do not disenfranchise voters nor deny equal protection of the laws.

The validity of state statutes, such as *N.J.S.A.* 19:23-45, which provide for a closed system of primary elections, has been clearly established in several decisions of this Court. Plaintiff raises no new issues of substance to distinguish her case from the cases upholding similar statutes, and therefore her appeal should be dismissed.

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), petitioners attacked the constitutionality of a New York statute which required a voter to enroll in the party of his choice at least 30 days before the general election in November in order to vote in the next subsequent party primary. The effect of this statute was to establish a cutoff date for enrollment approximately eight months prior to a presidential primary and 11 months prior to a nonpresidential primary. 410 U.S. at 760. In upholding the constitutionality of the New York statute, the Court rejected the petitioners' argument that the statute unconstitutionally disenfranchised them. *Id.* at 756-759. The Court reasoned that New York's statute "did not absolutely disenfranchise the class to which the petitioners belong" but "[r]ather . . . merely imposed a time deadline on the enrollment." *Id.* at 757. Imposition of such a deadline was held constitutional since it furthered the "legitimate and valid state goal" of "preserv[ing] the integrity of the electoral process" by preventing party "raiding." *Id.* at 760-762. Cases in which an unconstitutional disenfranchisement had been found were distinguished on the basis that under the statutes in those

cases "there was no way in which the members of [a particular] class could have made themselves eligible to vote." *Id.* In contrast, under the New York statute, the individual had only to register prior to the cutoff date in order to vote and, consequently, any disenfranchisement that occurred was self-inflicted. *Id.* at 758.

As in *Rosario*, the New Jersey statute at issue does not constitute a denial of the electoral franchise but merely a "time deadline" on enrollment which is completely within the control of a voter to satisfy. Neither does the New Jersey statute suffer from the infirmity of the Illinois statute struck down in *Kusper v. Pontikes*, 414 U.S. 51 (1973), which "locked" voters into a pre-existing party affiliation by preventing them from voting in a party's primary if they had voted in another party's primary within the preceding 23 months. 414 U.S. at 60. The only way available for Illinois voters to change their party allegiance was to forego voting in any primary for almost two years. *Id.* In contrast the New Jersey statute, like the New York statute upheld in *Rosario*, does not "lock" voters into any party since, as in *Rosario*, a New Jersey voter "may, if he wishes, vote in a different party primary each year," by the simple expedient of declaring his party affiliation 50 days prior to the primary election. 410 U.S. at 759.

Clearly, a time deadline such as provided in *N.J.S.A.* 19:23-45 does not constitute an unconstitutional infringement on voters' rights. Surely if cutoff dates of eight and 11 months are constitutional, as the Court held in *Rosario*, the much shorter cutoff date of 50 days provided in the New Jersey statute must be upheld. See also *Nader v. Schaffer*, 417 F. Supp. 837, 842, 847 (D. Conn. 1976), *aff'd mem.*, 429 U.S. 989 (1976) (six month waiting period for previously enrolled voters found reasonable).

Plaintiff attempts to avoid the holding of *Rosario* by arguing that the 50-day cutoff is unconstitutional since *N.J.S.A.* 19:23-14 permits prospective primary candidates to file their petitions up to 40 days prior to the primary date. Consequently, she argues that she is forced to declare her party affiliation before she knows who all the candidates are, thereby being deprived of her right to "intelligently" decide which party and candidate she wishes to support. However, the identical argument was rejected in *Rosario* in which the Court said that New York's delayed enrollment scheme was "not an arbitrary time limit unconnected to any important state goal" but rather accomplished "a legitimate and valid state goal" of "preserv[ing] . . . the integrity of the electoral process." *Id.* at 760-761. The integrity of the electoral process is preserved under such statutes by inhibiting party "raiding" in which sympathizers of one party vote in another's primary for a weak candidate. *Id.* Therefore, plaintiff's contention that she cannot constitutionally be required to declare her party affiliation before all possible candidacies have been announced [2] is patently frivolous in light of the recognized and legitimate purpose of the statute in preventing "raiding".

Appellant's second contention that the statute violates equal protection by exempting independent and newly registered voters is equally without substance. The residency qualification for New Jersey voters is 30 days in both the State and resident county. *N.J.S.A.* 19:31-5. New

2. It should be noted that the Supreme Court of New Jersey found that appellant "had failed to demonstrate" that any candidates filed their petitions after the date on which she was required to declare her party affiliation and therefore, the "alleged imperfection in the primary election procedure [was] deminimis and insufficient to overcome the self-inflicted character of her so-called 'disenfranchisement'" (A8).

residents who meet the 30-day durational residency requirement could be disenfranchised from the primary election if they have not established residency on or before the 50th day prior to the primary. Thus, unlike voters in plaintiff's situation, newly registered voters could, if included in the ambit of *N.J.S.A.* 19:23-45, be barred from voting without any "way in which . . . [to make] themselves eligible to vote." *Rosario v. Rockefeller, supra,* 410 U.S. at 757. Such a bar on newly registered voters in the New York statute was held unconstitutional in *Echevarria v. Carey,* 402 F. Supp. 183, 188 (S.D. N.Y. 1975), *aff'd mem.,* 538 F.2d 309 (2d Cir. 1976), vacated and remanded on question of mootness, 429 U.S. 808 (1976).[3] In *Echevarria* the district court found that the bar served no compelling state interest since "it is unrealistic to assume that many out-of-state persons will undertake the expense and suffer the inconvenience of moving to and establishing residency in New York simply so that they may raid a party's primary election." 402 F. Supp. at 188. The exemption of newly registered voters from *N.J.S.A.* 19:23-45 is thus clearly a legitimate legislative determination and not a violation of equal protection.

Neither does the exemption of independent voters raise a substantial equal protection question. Although the New York statute upheld in *Rosario* did not exempt independent voters, 410 U.S. at 754 n.3., the Connecticut statute upheld in *Nader v. Schaffer, supra,* distinguished between independents and previously enrolled voters by establishing a waiting period for independents of only three weeks as compared to the waiting period for previously enrolled voters of six months, 417 F. Supp. at 847.

3. This issue was not decided in *Rosario* since the petitioners in that case were not within the class of newly arrived voters and thus lacked standing to raise the issue. 410 U.S. at 759 n.9.

As reasoned in *Nader* "the legislature has, with some logic, imposed a longer waiting period on voters previously enrolled in other parties, as they are perhaps more likely to have a hostile motivation." *Id.* Clearly, it is reasonable to conclude that voters who have recently been affiliated with another party would be more likely to "raid" a primary than those with no previous party affiliation. As noted in *Ray v. Blair*, 343 U.S. 214, 226 n.14 (1952), "[i]n facilitating the effective operation of democratic government, a state might reasonably classify voters or candidates according to party affiliations." The exemption of independent voters from *N.J.S.A.* 19:23-45 is thus clearly a legitimate legislative determination and not a violation of equal protection.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of a substantial federal question.

Respectfully submitted,

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